BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELISSA ADAMS	)	
Claimant	)	
VS.	)	
	)	
HOSPIRA, INC.	)	Docket No. 1,069,056
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 15, 2014 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce Moore.

APPEARANCES

Mitchell Rice, of Hutchinson, Kansas, appeared for the claimant. Brian Fowler, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from April 11, 2014, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant failed to sustain her burden of proof that her left ankle injury arose out of and in the course of her employment with respondent. The claimant requests review of that decision.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

On March 1, 2014, claimant was cleaning freezers for respondent. When she finished cleaning a freezer, she would be required to wait for it to return to a normal freezer temperature. As she finished on one freezer, claimant decided she had time to take a break. The record indicates this was claimant's lunch break. However, claimant testified the break only lasted 15 minutes. Claimant clocked out, which was required when leaving the building and proceeded into the parking lot, intending to cross the street to the only area where smoking was allowed by respondent. This respondent had a very strict smoking policy, not even allowing smoking by persons sitting in their own cars. All smoking activities had to take place across the street by a telephone pole.

As claimant walked through the icy parking lot, she fell. A video from respondent's security camera indicates claimant was at the driveway exit of the parking lot when she fell. It is not disputed that claimant was on respondent's premises when she fell. Claimant remained on the lot driveway for a short period of time, until help came. At some point, she rolled off the driveway and onto the grass. She was concerned about the ice on the drive, worrying that approaching cars would be unable to stop and she would be injured more severely.

An ambulance was called and claimant was taken to the McPherson Hospital emergency room where x-rays determined she had fractured both the tibia and fibula above her left ankle. Claimant was then transported by ambulance to Hutchinson, Kansas, where she underwent surgery on her ankle under the care of Jonathan Loewen, M.D., of Pinnacle Sports Medicine & Orthopaedics.

An Employee Health Form documenting claimant's injury, indicates claimant was walking across the parking lot and "Felt leg snap. Fell down around last row of vehicles."[1] Claimant testified that she thought her leg broke while she was falling. Claimant later testified that the fall caused the leg to break.[2]

Shane Reif, respondent's human resources business partner, testified that respondent did not have a designated smoking area. The policy prohibited smoking on any of respondent's property, even in employee vehicles. The area near the telephone pole was utilized by the employees, but not designated as such.

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[1] P.H. Trans., Resp. Ex. B.

[2] *Id*. at 22.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b) and (c) provide:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) provides:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(f) provides:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
>
> . . .
>
> (C) The words, 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2013 Supp. 44-508(g):

> 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Under K.S.A. 2013 Supp. 44-508(f)(2)(B)(i), an injury by accident shall be deemed to arise out of and in the course of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident. This provision was enacted as part of the extensive amendments to the Act effective on May 15, 2011.

K.S.A. 2013 Supp. 44-508(f)(3)(A)(ii), also part of the 2011 amendments, provides that the words "arising out of and in the course of employment" shall not be construed to include an accident or injury which arose out of a neutral risk with no particular employment or personal character. This provision represents a significant departure from prior decisions that include neutral risks as compensable.

A case very similar to this was determined by the Board in 2012. In *LaTurner*[3], a Board Member analyzed a fall while an employee was on a smoke break. The determination rested upon a failure to find a causal connection between the conditions under which the work was required to be performed and the resulting accident. In *LaTurner,* the employer prohibited smoking in its facility, just as respondent did here. Nothing about the claimant's job duties in *LaTurner* required her to be on the patio where she slipped and fell, except her desire to smoke. The patio area, just as the parking lot here, was the property of the employer and was maintained by that employer. The claimant in *LaTurner, as here,* was on her lunch break and had clocked out.

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[3] *LaTurner v. Quaker Hill Nursing, LLC*, No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 5, 2012).

This Board Member finds the logic of *LaTurner* applies to this matter. There is nothing establishing a causal connection between the conditions under which claimant's work was required to be performed and the accident. Additionally, the accident arose out of a neutral risk or a personal risk not associated with the employment. The denial of benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to satisfy her burden of proving her accident arose out of and in the course of her employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of ALJ Bruce Moore dated April 15, 2014, is affirmed.

IT IS SO ORDERED.

Dated this 12th day of June, 2014.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce Moore, ALJ

[4] K.S.A. 2013 Supp. 44-534a.